The Act

The Vendors and Purchasers Act R.S.N.S. 1967, c.324, (reproduced in Appendix "A"), is a very brief statute which purports to: 1) delineate certain rules of evidence respecting land contracts and registered documents, 2) set out a procedure for determining the validity of objections or requisitions to title of lands under agreement of purchase and sale, and 3), in the absence of terms to the contrary in an agreement of purchase and sale, deem certain terms to apply (such as time for making and removing objections to title; adjusting for taxes, etc; and preparation of the deed, etc). The most common use of the Act is determining the validity of objections to title, and most of the reported case law in this jurisdiction deals with applications of this nature.

PROCEDURE

If a dispute arises between vendor and purchaser with respect to "... any requisition or objection or any claim

for compensation, or any other question arising out of or connected with the contract..." either party may make application to a Justice of the Trial Division of the Supreme Court (or Local Judge of the Trial Division of the Supreme Court) in chambers for a determination of the issue in dispute. The proceeding is initiated by the filing of an Originating Notice (Application Inter Partes) and supporting affidavit(s). Attached in Appendix "B" is a sample Originating Notice and supporting affidavit. While the Civil Procedure Rules require ten days notice, normally this requirement is waived with the consent of the parties.

Although it is always preferable to file in advance a Pre-Hearing Memorandum setting out the facts, issues, and applicable law, it is particularly essential in Vendors and Purchasers Act applications as, in most cases, the facts are not in dispute, but the legal issues arising from the facts are unresolved or in dispute. Considering that this

is a summary application procedure, one must assure that the Chambers Judge is provided with sufficient information (via affidavit(s), Pre-Hearing Memoranda, and copies of relevant cases) to address the issue(s) during oral argument.

Although there is no bar or prohibition against calling witnesses to provide oral evidence, or cross examining witnesses on their affidavits, it is rarely, if ever, done in Vendors and Purchasers Act applications. This is due to the fact that usually the facts are not in dispute, and if there is a significant dispute concerning facts, the Courts have usually held that the matter should proceed by way of Originating Notice (Action) and trial; not by way of summary proceeding under the Vendors and Purchasers Act. This view is supported in Atlantic Wholesalers, Division of Loblaws Ltd. v. Rainbow Realty Ltd., et al (1980) 41 N.S.R. (2d) 18 (N.S.S.C.T.D.) and in Evelyn Marie Riles v. Paul Sampson and the Bank of Nova Scotia (intervenor) ,

unreported, S.229/7, 1986(N.S.S.C.T.D.). In both of the aforementioned cases the courts held that it was inappropriate to make application in a summary manner under the Vendors and Purchasers Act to attempt to resolve issues which involved the rights of third parties and in which the facts were uncertain or in dispute.

Many applications under the Vendors and Purchasers Act are, by agreement of counsel and the parties, "friendly" applications -- i.e. neither party is seeking an order for costs of the application. Usually there are legal issues and the law is unclear, or there is conflicting law which requires clarification. In these instances both the Vendor and Purchaser want the issues resolved or clarified so that they can proceed to closing the transaction.

In the process of reviewing Nova Scotia cases for this paper it was apparent that, generally, even when there was no

agreement as to costs, if the issue was one that required adjudication, the courts usually did not award costs (see, however Downey v. Fitzgerald et al (1984) 65 N.S.R. (2d) 122 (N.S.S.C.A.D.) in which the trial judge awarded solicitor and client costs, which decision was varied by the Appeal Court to costs to be taxed on a party and party basis).

If the matter has been satisfactorily resolved at Chambers an Order is taken out in the customary form, issued, and if required, a certified copy of the Order can be registered at the appropriate Registry of Deeds to correct or complete the record. Attached as Appendix "C" is a sample Order.

SUBJECT MATTER AND DISPOSITION OF VARIOUS APPLICATIONS

As you will see from the brief review to follow Vendors and Purchasers Act applications result from a broad range of issues.

The issue of Caveats, or Statutory Declarations, purporting to give notice of a claim or pending legal action, or an interest in a property by way of an oral or unregistered agreement of purchase and sale, have been dealt with on numerous occasions by our courts, and they have been held to be invalid requisitions to title (see Church v. Forbes et al, (1983) 60 N.S.R. (2d), 211; Lemorand Projects Ltd v. Old Sack Holdings Limited and Grace (1987), 80 N.S.R. (2d) 133, and Downey v. Fitzgerald et al, Supra). In the above-mentioned cases the Courts have held that the Caveats or Statutory Declarations were not registerable instruments as defined by the Registry Act, R.S.N.S. 1967, C.265. In Church v. Forbes, supra the Court stated:

> "...It seems entirely unreasonable to me that a person may without resort to the Courts, by unilateral action bind the property of another unless such is provided by Statutes... I am satisfied, therefore, that the Caveat in question does not affect the title of land and is not a registerable instrument..."

In Fancy v. Irons (1988) unreported, S.H. No. 63571, Mr.

Justice Nunn differentiated or distinguished the above-mentioned cases and found valid an objection to title based on a Statutory Declaration claiming a fraudulent conveyance in contravention of the Assignment and Preferences Act R.S.N.S., 1967, C.16. In this case, however, the third party judgment creditor had already commenced an action claiming relief under the Assignment and Preferences Act, and gave actual notice of the commenced action to the Purchaser's solicitor. Additionally, the previous owner whose conveyance was being challenged made an Assignment in Bankruptcy shortly after the conveyance, giving rise to the conveyance being a reviewable transaction under the Bankruptcy Act. Given these facts and the remedies which could flow from them Mr. Justice Nunn found valid the objection to title and distinguished the cases in which a Caveat or Statutory Declaration is registered and no further action is taken.

The issue of whether or not judgments attach and create

an encumbrance to title has been dealt with in various fact situations. In Riles v. Samson and The Bank of Nova Scotia, supra, although the application was dismissed on procedural grounds, Mr. Justice Burchell went on to consider whether an Order pursuant to the Matrimonial Property Act vesting title in one spouse would negate previous registered judgments against the other spouse who previously held title as a joint tenant. Mr. Justice Burchell concluded that the judgments remained and encumbered title.

In J and V Investments Limited and Clayton Developments Limited (1986) unreported, S220/1, Mr. Justice MacDonald considered the effect of recorded judgments against previous owners, and the subsequent late registration of Deeds which proportedly were executed and delivered, but not registered, prior to the judgments being registered. Having reviewed the Registry Act and applicable case law, Mr. Justice MacDonald found that the judgments did not attach per se,

but he then considered the question of whether a challenge might issue over the land transfers being bona fide. Given this possibility he held that the objections to title were valid and required a deeper examination through evidence at trial rather than at chambers.

The issue of a right-of-way allegedly acquired by prescription, or adverse possession, was the subject matter of a Vendors and Purchasers Act application in George Washington Carver Credit Union v. Michael Chater (1975) unreported, S. 48/11. The late Chief Justice Cowan found that he didn't have to decide the issue of entitlement to the right-of-way; it was sufficient for him to find that there was some evidence that the right-of-way may exist, and this supported the objections to title as being valid.

In Nosrat Ollah Eblaghi and Carriage Homes Incorporated (1985) unreported, S.H. No. 53733, an application was made under the Vendors and Purchasers Act to determine the validity

of an objection to title concerning a registered oil burner agreement as an encumbrance. It was argued that the oil burner agreement, which purported to give notice that the oil burner remained a chattel and did not form part of the realty, was not a registerable instrument under the Registry Act and, instead of being registered at the real property Registry, should have been registered as a chattel at the Chattel Mortgage Registry. Madame Chief Justice Glube accepted this argument and found the objection to title to be invalid.

In Rockingham Development v. Highgate Village Ltd, et al (1984) 65 N.S.R. (2d) 439, the issue before the Court was whether certain restrictive covenants unequally or randomly applied in a subdivision scheme constituted a valid objection to title. The Court held that due to the nature of the covenants and their unequal application in that there was not a "common building scheme" that they did not constitute

a valid objection to title.

The issue of what adjustments are to be made at closing, and making requisitions to title within the required time, was the focus of Petrofina Canada Ltd. v. Markland Developments Ltd. (1977) 3 R.P.R. 33. In this case the purchaser entered into an Agreement of Purchase and Sale to buy a property by Quit Claim Deed, which Agreement of Purchase and Sale indicated that "there were no implied terms". The purchaser's solicitor ordered a tax certificate which indicated various municipal liens for sewer, sodding, sidewalks, curbs and gutters. However, no objections to title were made within the 30 days allowed in the Agreement of Sale. Mr. Justice Hallett held that there should be no adjustment for these liens, as the title objections were not made within the required time, and the Agreement of Purchase and Sale specifically stated there were no "implied terms" to the contract. This case illustrates the necessity to

closely scrutinize the Agreement of Purchase and Sale, and to make requisitions to title within the required time frame.

In Schlumberger v. Burke et al (1975) 21 N.S.R. (2d) 190 the court considered clause 5(c) of the Vendor and Purchasers Act, specifically the meaning of a vendor being "unable or unwilling" to remove an objection to title, and then unilaterally cancelling the contract. In this case it appears that the purchaser was a lessee of the vendor and had an option to purchase the vendor's property at an agreed upon price. The Purchaser exercised his option properly, however the Vendor through his solicitor gave notice to the Purchaser that the property was mortgaged for more than the purchase price and therefore the Vendor was unable to complete the sale. The Vendor then attempted to cancel the lease thereby trying to do away with the option at the same time. The Vendor readily admitted he did not want to sell the property upon the terms he had originally bargained. Mr. Justice MacIntosh,

quoted Middleton J, in Hurley v. Roy, 64 D.L.R. 375:

> " This provision was not intended to make the contract one which the Vendor can repudiate at his sweet will. The policy of the Court ought to be in favour of the enforcement of honest bargains, and it should be remembered that, when a contract deliberately made is not enforced because of some hardship the agreement impose on one contracting party, the effect is to transfer the misfortune to the shoulders of the other party, though he is admittedly entirely innocent."

At trial an order for specific performance was granted.

The issue of a recital in a deed which referred to an earlier unregistered deed and had stood the test of time, unchallenged, was the issue to be decided in Inter Lake Developments Limited and James William Slaunwhite, (1988), unreported, S.259/3. In this application Mr. Justice Davison considered the effect of Section 1(a) of the Vendors and Purchasers Act which reads as follows:

> **Rules of Evidence Respecting Land Contract**
>
> 1. In the completion of a contract of sale of land the rights and obligations of the vendor and purchaser shall, subject to any

> stipulation to the contrary in the contract, be regulated by the following rules:
>
> (a) recitals, statements and description of facts, matters and parties contained in statutes, deeds, instruments, conveyances, or statutory declarations, any of which are more than twenty years old at the date of the contract, unless and except insofar as they are proved to be inaccurate, shall be sufficient evidence of the truth of such facts, matters and descriptions;

In Inter Lake Developments Limited v. James William Slaunwhite, supra, a recital in a 1947 deed referred to the vendor's earlier having the property conveyed to them by deed in 1914. The 1914 deed was never registered and could not be located. Although forty (40) years had passed since the 1947 conveyance, nevertheless it was impossible to trace title back sixty (60) years. Mr. Justice Davison reviewed an article by Mr. Charles MacIntosh, Q.C. which was published in Vol.14 of the Nova Scotia Law News in which Mr. MacIntosh argued:

> "The practice by some solicitors commencing a search forty years back from the present appears to be founded on an assumption that the Limitations of Actions Act had set this

> as a standard. This is not the case. The traditional search period of sixty years was developed to protect against the possibility of double claim of title and to establish a standard, short of a chain continuous from a grant from the Sovereign, which would be recognized as one which a purchaser would not be able to reject. The reasons for the sixty year search are as valid today as they were in 1749."

Mr. Justice Davison also reviewed several decisions referred to by Mr. MacIntosh in his article. Acknowledging that to the best of his knowledge this section of the Vendors and Purchasers Act had not been judicially considered, Mr. Justice Davison went on to rule "... that the recital as set forth in the 1947 deed should be accepted for the truth of the information therein contained in the absence of evidence to the contrary and that it is sufficient to establish paper title beyond sixty years." The objection to title was determined to be invalid.

In In The Matter of an Application of Kirk E. McCulloch, etc, (1980), unreported, S.129/3, Mr. Justice MacIntosh

heard an application pursuant to S.5 of the Vendors and Purchasers Act to determine whether the balance in a Contingency Fund of a Condominium Corporation should be subject to adjustment at sale. After an extensive review of the By-Laws of the Condominium Corporation Mr. Justice MacIntosh decided that the Contingency Fund was deemed to be a part of the common elements and therefore formed a part of the realty and was covered by the purchase price of the unit. Therefore there was no adjustment to the vendor's credit as the Agreement of Purchase and Sale did not specifically provide for an adjustment of this Fund. This case, like Petrofina Canada Limited v. Markland Developments Limited, supra, illustrates the need for careful drafting of an Agreement of Purchase and Sale, or a Counter Offer, to take into account adjustments that it is the intention of the parties to adjust for.

Another interesting case dealing with the Vendors and

Purchasers Act is Resolutes Amateur Athletic Club of Halifax v. African Methodist Episcopal Church of Halifax, (1980) 44 N.S.R.(2d) p.250. In this case "Resolutes" was incorporated under a Private Members Bill as a non-profit association. Section 4 of its by-laws indicated

> "4. The said club shall have the power to make contracts for the purpose of the club, to sue and be sued in the corporate name, to take, receive and hold for its general uses and for any particular department of its work, by gift, devise bequest, grant or purchase real or personal property not exceeding in value the sum of ten thousand dollars, and to sell and convey and mortgage and lease the same."

In 1941 Resolutes purchased the land at issue for the sum of Five thousand dollars ($5,000.00) however by 1980 the land had appreciated in value and was then under Agreement of Purchase and Sale for the sum of Twenty-five thousand dollars ($25,000.00). The application under the Vendors and Purchasers Act was brought to determine whether Resolutes had authority to sell this property considering that the sale price exceeded the Ten thousand dollar limitation as

set forth in S.4 of its by-laws. The Court considered the authority of the Corporation, and the issue of escheats, and found that the Corporation, Resolutes, did have the authority to convey the said land at the agreed upon price, Twenty-five thousand dollars, and that the objection to title was not valid.

The aforementioned cases are only a brief, representative sampling of a variety of issues dealt with in Vendors and Purchasers Act applications. They are not meant to be an exhaustive review. However, from these cases several general guidelines can be deciphered. First, an application will be entertained if it involves a question of law and if the facts are not in dispute. If there is a substantial dispute with reference to the facts, or if there are rights of third parties that could be effected by a decision it is likely that the Chambers judge will not decide the matter at Chambers but will suggest that the matter should proceed by way of

Originating Notice (Action) and trial where there can be a proper adjudication of the factual disputes and where the third parties can be fully represented and put forward their positions. Second, a Vendors and Purchasers Act application should not be used as a means of attempting to have the Court "certify title", or used as a short-cut to a quieting of titles action. In Atlantic Wholesalers v. Rainbow Realty et al, supra, Mr. Justice Hallett made the following comments:

> "...I would also point out that the brief filed on behalf of the vendors states that no objection to title has been made. I inquired of counsel for the purchaser as to whether or not objection to title had been made and, although his answers were not clear, in the final analysis he did seem to indicate there was an objection to title based on the registration of the Sobey's and Econo Mall's documents subsequent to the registration of the Agreement of Purchase and Sale between the vendor and the purchaser. The purchaser's position before the Court is strange in that the purchaser does not consider that the objection it is raising has any validity but is asking the Court to say so; in short, the purchaser is asking the Court to certify title. ..."

It is clear from the above quote and Mr. Justice Hallett's decision in the Atlantic Wholesaler's case that the Court will not be put in a position of "certifying title". Furthermore, I would suggest that it would be risky to consider an order made under the Vendors and Purchasers Act as an indemnification allowing one to certify an otherwise uncertifiable title.